

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al.,

Plaintiffs,

vs.

MARY SELECKY, Secretary of the  
Washington State Department of Health,  
et al.,

Defendants,

and

JUDITH BILLINGS, et al.,

Intervenors.

Civil Action No. C07-5374

PLAINTIFFS' BENCH BRIEF  
REGARDING WASHINGTON  
STATE CATHOLIC HOSPITALS  
AND PHARMACIES

Plaintiffs submit this bench brief to provide the Court with an overview of Catholic hospitals and pharmacies in Washington State and their beliefs and practices regarding emergency contraceptives.<sup>1</sup>

<sup>1</sup> Plaintiffs represented to the Court that they would file this brief on December 14, 2011, but were unable to file until today when they received the signed supporting declarations from the Catholic health systems.

PLAINTIFFS' BENCH BRIEF REGARDING  
WASHINGTON STATE CATHOLIC HOSPITALS  
AND PHARMACIES - 1

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1       **A. Catholic hospitals are an integral part of the health care system.**

2       Across the country and in Washington State, Catholic hospitals are a major  
3 component of our health care system. Nationally, Catholic hospitals account for  
4 over 12 percent of all community hospitals and over 15 percent of all hospital  
5 beds.<sup>2</sup> Each year, one in six patients in the United States is cared for in a  
6 Catholic hospital.<sup>3</sup> Each year, Catholic hospitals handle nearly 19 million  
7 emergency room visits and more than 102 million outpatient visits.<sup>4</sup>

9       Through their commitment to serve the common good and especially to care  
10 for the poor,<sup>5</sup> Catholic hospitals provide not only traditional health care, but also  
11 social services. Catholic hospitals provide a higher percentage of many public  
12 health and specialty services than government, for-profit, or other non-profit  
13 hospitals.<sup>6</sup> Such services include alcohol and drug abuse treatment, community  
14 outreach and social work services, HIV/AIDS services, and breast cancer  
15 screening and mammograms.<sup>7</sup>

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20 <sup>2</sup> Catholic Health Association, *Catholic Healthcare in the United States, January 2011*,  
21 1, <http://www.chausa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147489259>.

22 <sup>3</sup> *Id.*

23 <sup>4</sup> *Id.* at 2.

24 <sup>5</sup> See United States Conference of Catholic Bishops, *Ethical and Religious Directives*  
25 *for Catholic Health Care Services, Fifth Edition*, 10 (citing “the biblical mandate to care  
26 for the poor”), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

27 <sup>6</sup> Catholic Health Association, 1.

<sup>7</sup> *Id.*

1 Catholic hospitals, like all hospitals, are providing an increasing amount of  
2 primary care through their emergency rooms, particularly to the poor. According  
3 to a CDC study, between 1996 and 2006 emergency room visits grew by 32  
4 percent.<sup>8</sup> According to the professor who led the CDC study, it is difficult to find  
5 physicians who accept Medicaid, so the poor often turn to the emergency room for  
6 primary care.<sup>9</sup> As a result, Medicaid patients use the emergency room at a rate  
7 nearly four times as high as those with private insurance.<sup>10</sup>

9 Catholic hospitals are also an integral part of the health care system in  
10 Washington State. Three in ten of the State's hospital beds are in a Catholic  
11 hospital.<sup>11</sup> Three of Washington State's Catholic hospitals are certified as critical  
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15 <sup>8</sup> Centers for Disease Control and Prevention, National Center for Health Reports,  
16 *National Hospital Ambulatory Medical Care Survey: 2006 Emergency Department  
Summary*, <http://www.cdc.gov/nchs/data/nhsr/nhsr007.pdf>.

17 <sup>9</sup> American Academy of Family Physicians, *Emergency Room Visits Climb Amid  
Primary Care Shortages, Study Results Show*,  
18 [http://www.aafp.org/online/en/home/publications/news/news-now/health-of-the-  
public/20080827er-visits.html](http://www.aafp.org/online/en/home/publications/news/news-now/health-of-the-public/20080827er-visits.html).

19 <sup>10</sup> Centers for Disease Control and Prevention, 3 ("The visit rate for Medicaid patients  
20 (82 per 100 persons with Medicaid) was higher than the rate for those with . . . private  
insurance (21 per 100 persons with private insurance).").

21 <sup>11</sup> Washington State Department of Health, Center for Health Statistics, *Hospital Data:  
Volumes*, <http://www.doh.wa.gov/EHSPHL/hospdata/YearEnd/2010/Volume%202010.xls>.  
22 Data for Providence St. Mary Medical Center is separately available at Washington  
23 State Department of Health, *2011 Providence St. Mary Medical Center Budget Report*,  
[www.doh.wa.gov/ehsphl/hospdata/Budget/2011/2011-050.xls](http://www.doh.wa.gov/ehsphl/hospdata/Budget/2011/2011-050.xls).

24 A full list of Washington State hospitals, grouped by health system, is available at  
25 Washington State Hospital Association, *Health Systems with Washington Hospitals*,  
[www.doh.wa.gov/ehsphl/hospdata/Budget/2011/2011-050.xls](http://www.doh.wa.gov/ehsphl/hospdata/Budget/2011/2011-050.xls).

26 The following Washington State hospitals identify themselves as Catholic hospitals:

- 27 • Ascension Health: Lourdes Medical Center;

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1 access hospitals, a designation created by Congress to assure access to health  
2 care in rural areas.<sup>12</sup>

3 **B. Catholic hospitals operate under the Ethical and Religious**  
4 **Directives for Catholic Health Care Services.**

5 Catholic hospitals operate under the Ethical and Religious Directives for  
6 Catholic Health Care Services (“Ethical and Religious Directives” or  
7 “Directives”).<sup>13</sup> The Directives are produced by the United States Conference of  
8 Catholic Bishops to “reaffirm the ethical standards of behavior in health care  
9 that flow from the Church’s teaching on the dignity of the human person” and  
10 “provide authoritative guidance on certain moral issues that face Catholic health  
11 care today.”<sup>14</sup>

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- 15 • Franciscan Health System: St. Anthony Hospital, St. Clare Hospital, St.  
16 Elizabeth Hospital (formerly Enumclaw Regional Hospital), St. Francis  
Hospitals, and St. Joseph Medical Center;
  - 17 • PeaceHealth: PeaceHealth Southwest Medical Center, PeaceHealth Memorial  
18 Hospital (a separate campus of PeaceHealth Southwest Medical Center),  
PeaceHealth St. John Medical Center, and PeaceHealth St. Joseph Medical  
Center; and
  - 19 • Providence Health & Services: Providence Centralia Hospital; Providence Holy  
20 Family Hospital, Providence Mount Carmel Hospital, Providence Regional  
21 Medical Center Everett – Colby Campus, Providence Regional Medical Center  
22 Everett – Pacific Campus, Providence Sacred Heart Medical Center & Children’s  
Hospital, Providence St. Joseph’s Hospital, Providence St. Mary Medical Center,  
and Providence St. Peter Hospital.

12 Washington State Department of Health, *Rural Health Programs*,  
23 <http://www.doh.wa.gov/hsqa/ocrh/cah/cah399.html>.

24 <sup>13</sup> United States Conference of Catholic Bishops, *Ethical and Religious Directives for*  
25 *Catholic Health Care Services, Fifth Edition*, available at [http://www.usccb.org/issues-](http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf)  
26 [and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-](http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf)  
27 [Catholic-Health-Care-Services-fifth-edition-2009.pdf](http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf).

<sup>14</sup> Decl. of John Brehany, Ex. Dir. and Ethicist, Catholic Medical Ass’n (Ex. A), ¶ 6,  
quoting *Directives* at 4.

1 The Ethical and Religious Directives state, among other things, that “Catholic  
2 health care institutions are not to provide abortion services, even based upon the  
3 principle of material cooperation.”<sup>15</sup> Further, the Directives define abortion as  
4 “the termination of pregnancy before viability . . . includ[ing] the interval  
5 between conception and implantation.”<sup>16</sup>

7 Pope Benedict XVI has encouraged Catholic pharmacists to advocate for their  
8 right of conscientious objection, specifically the right “not to collaborate either  
9 directly or indirectly by supplying products for the purpose of decisions that are  
10 clearly immoral such as, for example, abortion or euthanasia.”<sup>17</sup>

12 The Ethical and Religious Directives permit Catholic health care institutions  
13 to treat sexual assault victims with emergency contraception under certain  
14 conditions. The Directives state that “[a] female who has been raped should be  
15 able to defend herself against a potential conception from the sexual assault.”<sup>18</sup>

17 After “appropriate testing” shows “no evidence that conception has occurred  
18 already,” a Catholic hospital may treat a sexual assault victim with “medications  
19 that would prevent ovulation, sperm capacitation, or fertilization.”<sup>19</sup> It is “not  
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22 <sup>15</sup> *Id.* ¶ 7, quoting *Directives* ¶ 45.

23 <sup>16</sup> *Id.* ¶ 7, quoting *Directives* ¶ 45.

24 <sup>17</sup> *Id.* ¶ 8, quoting *Address of His Holiness Benedict XVI to Members of the International*  
25 *Congress of Catholic Pharmacists* (Oct. 29, 2007), available at  
[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2007/october/documents/hf\\_ben-xvi\\_spe\\_20071029\\_catholic-pharmacists\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/october/documents/hf_ben-xvi_spe_20071029_catholic-pharmacists_en.html).

26 <sup>18</sup> *Id.* ¶ 9, quoting *Directives* ¶ 36.

27 <sup>19</sup> *Id.* ¶ 10, quoting *Directives* ¶ 36.

1 permissible, however, to initiate or recommend treatments” that could cause “the  
2 removal, destruction, or interference with the implantation of a fertilized  
3 ovum.”<sup>20</sup>

4 According to Catholic moral teaching, “a law that requires a health care  
5 institution or professional to violate a judgment of conscience—particularly in a  
6 matter as serious as cooperation in the destruction of innocent human life—is an  
7 unjust law, and one is not morally bound to obey it.”<sup>21</sup>

9 The Ethical and Religious Directives also require Catholic health care  
10 institutions to “respect the diocesan bishop’s pastoral responsibility.”<sup>22</sup> The  
11 Directives state that, “[a]s teacher, the diocesan bishop ensures the moral and  
12 religious identity of the health care ministry.”<sup>23</sup> In August 2006, the Washington  
13 State Catholic Conference, which represents the Catholic Bishops of Washington  
14 State, issued a statement on “Conscience and Pharmacists’ Responsibilities.”<sup>24</sup>  
15 The bishops’ statement says that “in some cases [Plan B] may induce abortion by  
16 preventing implantation” and that the Catholic Church “supports pharmacists,  
17 especially those who follow Catholic moral teaching, who uphold their right to act  
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23 <sup>20</sup> *Id.*, quoting *Directives* ¶ 36.

24 <sup>21</sup> *Id.* ¶ 12, citing *Catechism of the Catholic Church* §§ 1778, 1795, 2242 (2d ed. 2000).

25 <sup>22</sup> *Id.* ¶ 11, quoting *Directives* ¶ 37.

26 <sup>23</sup> *Id.*, quoting *Directives* at 8.

27 <sup>24</sup> Washington State Catholic Conference, *Conscience and Pharmacists’ Responsibilities*  
(Aug. 2006), [www.thewsc.org/images/stories/Resources/Statements/cons.pdf](http://www.thewsc.org/images/stories/Resources/Statements/cons.pdf).

1 according to the dictates of their conscience when asked to dispense such  
2 drugs.”<sup>25</sup>

3 **C. Washington Catholic hospitals do not stock or dispense emergency**  
4 **contraceptives except as permitted under the Ethical and**  
5 **Religious Directives.**

6 Franciscan Health System, Providence Health & Services, and PeaceHealth  
7 are the three largest Catholic hospital networks in Washington State.<sup>26</sup> Together,  
8 these Catholic health systems are responsible for 18 hospitals, 17 inpatient  
9 pharmacies, and 15 outpatient or retail pharmacies in Washington State.<sup>27</sup>

10 In their declarations filed with this brief, Timothy Lynch for Franciscan  
11 Health System, Scott Jamieson for Providence Health & Services, and Bridget  
12 Carney for PeaceHealth state that their policies prohibit their pharmacies from  
13 stocking or dispensing *ella*; inpatient pharmacies may stock Plan B, but only for  
14 treatment of sexual assault victims, and even then only in conformity with the  
15 Ethical and Religious Directives.<sup>28</sup> Only one Catholic inpatient pharmacy has  
16 stocked *ella* for any reason, and that situation has now been addressed.<sup>29</sup> Some  
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21 <sup>25</sup> *Id.*

22 <sup>26</sup> *See supra*, n. 11. Plaintiffs did not secure a declaration concerning Lourdes Medical  
23 Center, the only Washington State Catholic hospital not managed by Franciscan Health  
24 System, Providence Health & Services, or PeaceHealth.

24 <sup>27</sup> Decl. of Timothy Lynch, Franciscan Health Systems (“Franciscan Decl.”) (Ex. B) ¶ 3;  
25 Decl. of Scott Jamieson, Providence Health & Systems (“Providence Decl.”) (Ex. C) ¶ 3;  
26 Decl. of Bridget Carney, Peacehealth (“PeaceHealth Decl.”) (Ex. D) ¶¶ 1, 3.

26 <sup>28</sup> Franciscan Decl. ¶ 5-7; Providence Decl. ¶ 6-8; PeaceHealth Decl. ¶ 5-8.

27 <sup>29</sup> Franciscan Decl. ¶ 7; Providence Decl. ¶ 8; PeaceHealth Decl. ¶ 13.

1 Catholic outpatient or retail pharmacies were found to be stocking Plan B in  
2 violation of hospital policy, but those situations have all been corrected.<sup>30</sup>

3 **D. Neither Governor Gregoire’s office nor the Washington**  
4 **Department of Health involved Catholic organizations in the**  
5 **rulemaking process.**

6 Although Governor Gregoire’s office was aware that the Catholic Church  
7 objected to the Governor’s plan to eliminate pharmacies’ and pharmacists’ right  
8 to refer for reasons of conscience, no Catholic organizations were invited to or  
9 included on the Governor’s “stakeholder task force.” The Washington State  
10 Catholic Conference wrote Governor Gregoire in March 2006 to express the  
11 Church’s concern that the Governor’s proposed rule would interfere with the  
12 religious freedom of health care professionals to “provide healthcare service in a  
13 manner consistent with their moral beliefs.”<sup>31</sup> However, when the Governor’s  
14 office assembled its “stakeholder task force” that summer, it included *three*  
15 *separate* women’s rights groups—Planned Parenthood, NARAL, and Northwest  
16 Women’s Law Center—but no representatives of any religious organization with  
17 conscientious objections to emergency contraception.<sup>32</sup> The Board of Pharmacy’s  
18 executive director at the time, Steve Saxe, knew that Catholic hospitals had  
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24 <sup>30</sup> Franciscan Decl. ¶ 8; Providence Decl. ¶ 9; PeaceHealth Decl. ¶ 9-12.

25 <sup>31</sup> Letter from Sr. Sharon Park, OP, Exec. Dir. Wash. St. Cath. Conf., to Gov. Christine  
26 Gregoire (Mar. 15, 2006) (GOV0002510) (Ex. E).

27 <sup>32</sup> See Pls’ Ex. 198, Email from Steve Saxe to Laure Jenkins, *et al.* (Aug. 24, 2006)  
(naming attendees at Aug. 23, 2006, meeting of stakeholder task force).



1 pharmacies.<sup>33</sup> But in the discussions leading up to the Board's decision to pass  
2 the pharmacy and pharmacist responsibility rules, the Board did not discuss the  
3 impact they would have on Catholic hospitals and pharmacies.<sup>34</sup>

4 **E. The Board of Pharmacy has not inquired into whether Catholic**  
5 **pharmacies stock Plan B and *ella*.**

6 More than three and a half years after the Washington State Catholic  
7 Conference of Bishops filed a brief in this case, and more than two years after the  
8 Ninth Circuit struck down this Court's preliminary injunction, the Board of  
9 Pharmacy has still not inquired into whether Catholic pharmacies are declining  
10 to stock Plan B and *ella*. The Conference filed an amicus brief with the Ninth  
11 Circuit in April 2008 stating that it "holds a sincere religious belief that life  
12 begins at conception and that Plan B prevents implantation and can destroy  
13 innocent human life."<sup>35</sup> The Catholic bishops' brief also asserted "the right of  
14 pharmacists and pharmacy owners to follow their consciences when asked to  
15 dispense Plan B."<sup>36</sup> In October 2009, the Ninth Circuit vacated this Court's  
16 preliminary injunction, which had enjoined Defendants from enforcing the rules  
17 at issue in this case against pharmacies or pharmacists with conscientious  
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22 <sup>33</sup> Realtime Transcript of Proceedings, Nov. 30, 2011, 40:16-23 (Court's examination of  
23 Steve Saxe) (Ex. F).

24 <sup>34</sup> Realtime Transcript of Proceedings, Dec. 9, 2011, 113:10-13 (Court's examination of  
25 Susan Boyer) (Ex. G).

26 <sup>35</sup> Brief of Amicus Curiae Washington State Catholic Conference of Bishops at 1,  
27 *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (Nos. 07-36039, 07-36040) (Ex. H.).

<sup>36</sup> *Id.* at 3.

1 objections to Plan B.<sup>37</sup> However, Susan Boyer, who has been the Board of  
2 Pharmacy's Executive Director since before the injunction was lifted, who was a  
3 Board member at the time the regulations at issue were finalized, and who  
4 acknowledges that the regulations apply with equal force and effect on the  
5 Catholic pharmacies, testified that she still has not contemplated the  
6 relationship between the Board's 2007 rules and Catholic pharmacies.<sup>38</sup>  
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### 8 CONCLUSION

9 Catholic health systems play a crucial role in providing health care services in  
10 Washington, including to the poor. These religious-based health systems prohibit  
11 their pharmacies from stocking or dispensing emergency contraceptives in their  
12 outpatient or retail pharmacies. Their inpatient pharmacies are allowed to  
13 dispense Plan B only for treatment of sexual assault victims, and even then only  
14 after appropriate testing in accordance with the Ethical and Religious Directives.  
15 The Board has known that Catholics have conscientious objections to providing  
16 emergency contraception on demand since at least 2006.  
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19 Intervenor assert that they called ten Catholic pharmacies, and three  
20 stocked Plan B.<sup>39</sup> Because Intervenor failed to identify these pharmacies, their  
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22 <sup>37</sup> *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1142 (9th Cir. 2009); *Stormans, Inc. v.*  
23 *Selecky*, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007). By order of this Court, and by  
24 Defendants' stipulation, "the State Defendants will not take investigative or enforcement  
25 action against Plaintiffs or their employers under WAC 246-863-095(4)(d) or WAC 246-  
26 869-010(4)(d) until a trial on the merits has concluded." Dkt. 355 at 2.

27 <sup>38</sup> Realtime Transcript of Proceedings, Dec. 9, 2011, 116:17-20 (Court's examination of  
Susan Boyer).

<sup>39</sup> Dkt. 523 at 5, Ex. C.

1 claims are impossible to address. But the most important facts are those  
2 Intervenor overlook: The vast majority of the Catholic pharmacies they  
3 contacted did not stock or dispense Plan B; those that allegedly did were in  
4 violation of their hospitals' conscientious beliefs and established policies; and  
5 once notified, Catholic hospitals promptly addressed the situation and ensured  
6 that their pharmacies are now compliant with the Ethical and Religious  
7 Directives.

9 In any event, even if there were isolated instances of noncompliance with the  
10 Directives, that does not change what the official policy of the Catholic hospitals  
11 in Washington is, nor does it change an undeniable fact that goes to the heart of  
12 this case: Catholic outpatient and retail pharmacies across the state will not  
13 stock or dispense Plan B and *ella*, regardless of how many patients request it.

15 The policies of Catholic hospitals and pharmacies are grounded in a deeply-  
16 held religious conviction that life begins at conception. The Plaintiffs share this  
17 belief. But unlike the Plaintiffs, the Board has made no effort to investigate or  
18 enforce the subject regulations against any of these Catholic pharmacies. This  
19 provides yet another example of how the Regulations do not operate in a neutral  
20 and generally applicable manner.

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27 PLAINTIFFS' BENCH BRIEF REGARDING  
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AND PHARMACIES - 11

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27 PLAINTIFFS' BENCH BRIEF REGARDING  
WASHINGTON STATE CATHOLIC HOSPITALS  
AND PHARMACIES - 12

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